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Ng Chia Wei v Air Asia Bhd & Ors

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HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO PA-12A-8–02 OF 2018
AZMI ABDULLAH JC
1 NOVEMBER 2018

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Civil Procedure — Striking out — Appeal against order allowing striking out — Sessions court allowed defendants' striking out application — Plaintiff appealed against decision of sessions court — Whether Industrial Court's jurisdiction and function were separate and distinct from sessions court — Whether plaintiff's claims in Industrial Court and sessions court based on different causes of action — Whether parties in plaintiff's claim in Industrial Court and sessions court were different — Whether plaintiff's claims led to unjust enrichment — Rules of Court 2012 O 18 r 19(1)(b) & (d)

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This was the plaintiff's appeal against the sessions court's decision dated 13 February 2018 allowing the defendants' application to strike out the plaintiff's statement of claim essentially on the argument of duplicity of action by the plaintiff as notwithstanding his action against the first and the second defendants in the Industrial Court under s 20 of Industrial Relations Act 1967, the plaintiff had also instituted the action before the sessions court against the same two defendants together with five other defendants. The defendants' application was made under O 18 r 19(1)(b) and (d) of the Rules of Court 2012. Their averment was that the plaintiff's claim overlapped with his claim in the Industrial Court against the first and the second defendants. The plaintiff was under the employment of the second defendant and the first defendant owned 100% of the second defendant. The first and the second defendants operated as one unit. Arising from the plaintiff's excellent performance, he was appointed as the acting head of procurement in August 2016 and subsequently promoted as the acting head of procurement on 1 November 2016. The third to seven defendants were the employees of the first and second defendants, each heading separate departments. The third to the seventh defendants unlawfully conspired with each other and other persons whose identities were uncertain as well as the second defendant to oust the plaintiff from his position as the acting head and thereafter as the head of procurement and damaged or destroyed the plaintiff's employment with the predominant purpose of injuring the plaintiff. On 2 December 2016, the plaintiff was forced to leave his job immediately in an utmost stressful and embarrassing atmosphere watched by his team members and other staffs of the second defendants. His dignity and reputation were destroyed as he lost his employment and livelihood at the age of 43. The plaintiff also suffered damage

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to his economic expectations, loss of reputation, stress, anxiety and inconvenience as well as injury to his feeling. The plaintiff lodged a complaint with the Industrial Relations Department for wrongful and unfair dismissal pursuant to s 20 of the Industrial Relations Act 1967 on 20 December 2016. The defendants retaliated maliciously and destroyed the plaintiff's opportunity to obtain permanent job with Dell Computers. The plaintiff filed the suit in the sessions court in August 2017 and claimed for conspiracy, including exemplary damages and aggravated damages against all the defendants jointly and severally. He also claimed for damages against the first and second defendants for negligence. On 13 February 2018, the sessions court allowed the defendants' application to strike out the plaintiff's statement of claim,hence, the present appeal. The plaintiff argued that the plaintiff's claim was not obviously unsustainable with the defendants' allegations of duplicity of proceeding being misconceived. The issues arose were: (a) whether the Industrial Court's jurisdiction and function were separate and distinct from the sessions court; (b) whether the two claims were based on different causes of action; (c) whether the parties in the two claims were different; and (d) whether the claims led to unjust enrichment.

Held, allowing the plaintiff's appeal; setting aside decision of the sessions court; and reinstating the plaintiff's claim in the sessions court:

(1) From the statement of claim of the present case, the plaintiff's claim in the session court was for the damages for conspiracy and negligence, both of which were causes of action in tort which the Industrial Court had no jurisdiction to grant damages to the plaintiff for such claim. In allowing the striking out, the sessions court failed to appreciate that the plaintiff did not claim damages for wrongful dismissal in his statement of claim. The plaintiff was not seeking for common law remedy for his wrongful dismissal in the sessions court whereby his claim was for damages for conspiracy and negligence which were causes of action in tort. Hence, the plaintiff's claim in the sessions court was distinct from the Industrial Court case (see paras 19–21).

(2) The plaintiff's cause of action in the Industrial Court was for wrongful and unfair dismissal. The issues involved were whether the purported retrenchment was genuine and whether the termination of the plaintiff's employment was with or without just cause. The plaintiff's cause of action in the sessions court were tort of conspiracy and negligence. The elements needed to be established and the issues involved were completely different from that of the Industrial Court case. There was no duplicity of proceedings just by the reason of the two suits sharing the same underlying facts. The causes of action were different in nature and the remedies sought for were entirely different (see paras 22–23 & 26).

(3) It was trite law that when a wrong had been done by several parties either jointly or jointly and severally to another party, that party was entitled to file a claim against all or any one or more of the wrong doers. Since the third to seventh defendants could not be joined as parties in the Industrial Court, it was apt that a separate action was brought against them in a civil court (see para 30).

(4) The issue of overlapping damages would not arise as the damages to be awarded in the present suit arose from a different cause of action in the Industrial Court proceedings. In any event, it was trite law that the plaintiff must prove his damages. If there were overlapping damages as alleged, the court in assessing damages could always take into account the award granted in another case and made such necessary deduction or adjustment to avoid double recovery. In the Industrial Court, until the present appeal was argued, the plaintiff had not filed a statement of case. There was therefore completely no legal or factual basis for the defendants to content that there was a duplicity of proceedings thus such contention was purely conjecture (see paras 34–36).

[Bahasa Malaysia summary

Ini adalah rayuan plaintif terhadap keputusan mahkamah sesyen bertarikh 13 Februari 2018 yang membenarkan permohonan defendan untuk membatalkan penyataan tuntutan plaintif pada asasnya pada hujahan kependuaan tindakan oleh plaintif walau apa pun tindakannya terhadap defendan pertama dan kedua dalam Mahkamah Perusahaan di bawah s 20 Akta Perhubungan Perusahaan 1967, plaintif juga telah memulakan tindakan tersebut di hadapan mahkamah sesyen terhadap dua defendan yang sama bersama lima defendan lain. Permohonan defendan dibuat di bawah A 18 k 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah 2012. Dakwaan mereka adalah bahawa tuntutan plaintif bertindih dengan tuntutannya di Mahkamah Perusahaan terhadap defendan pertama dan kedua. Plaintif adalah di bawah penggajian defendan kedua dan defendan pertama memiliki 100% defendan kedua. Defendan pertama dan kedua dikendalikan sebagai satu unit. Berikutan prestasi plaintif yang cemerlang, dia telah dilantik sebagai ketua pemangku perolehan pada bulan Ogos 2016 dan seterusnya dinaikkan pangkat sebagai ketua pemangku perolehan pada 1 November 2016. Defendan ketiga hingga ketujuh adalah pekerja defendan pertama dan kedua, masing-masing mengetuai jabatan berasingan. Defendan ketiga hingga ketujuh secara tidak sah berkonspirasi antara satu sama lain dan orang lain yang identitinya tidak dikenal pasti serta defendan kedua untuk menggulingkan plaintif dari jawatannya sebagai ketua pemangku dan kemudiannya sebagai ketua perolehan dan merosakkkan atau menghancurkan pekerjaan plaintif dengan tujuan utama mencederakan plaintif. Pada 2 Disember 2016, plaintif terpaksa meninggalkan tugasnya dengan segera dalam suasana yang sangat tertekan dan memalukan yang ditonton oleh ahli pasukannya dan kakitangan defendan

kedua yang lain. Maruah dan reputasinya musnah ketika dia kehilangan pekerjaan dan mata pencariannya pada usia 43 tahun. Plaintif juga mengalami kerugian terhadap jangkaan ekonomi, kehilangan reputasi, tekanan, kecemasan dan ketidakselesaan serta kecederaan terhadap perasaannya. Plaintif membuat aduan dengan Jabatan Perhubungan Perusahaan untuk pemecatan yang salah dan tidak wajar menurut s 20 Akta Perhubungan Perusahaan 1967 pada 20 Disember 2016. Defendan membalas dengan secara berniat jahat dan memusnahkan peluang plaintif untuk mendapatkan pekerjaan tetap dengan Dell Computers. Plaintif memfailkan guaman tersebut di mahkamah sesyen pada bulan Ogos 2017 dan mendakwa untuk konspirasi, termasuk ganti rugi teladan dan ganti rugi teruk terhadap semua defendan secara bersama dan berasingan. Dia juga mendakwa ganti rugi terhadap defendan pertama dan kedua untuk kecuaian. Pada 13 Februari 2018, mahkamah sesyen membenarkan permohonan defendan untuk membatalkan penyataan tuntutan plaintif, oleh itu, rayuan ini. Plaintif berhujah bahawa tuntutan plaintif adalah tidak jelas tidak dapat dipertahankan dengan tuduhan defendan tentang kependuaan prosiding salah tanggap. Isu-isu yang timbul ialah: (a) sama ada bidang kuasa dan fungsi Mahkamah Perusahaan berasingan dan berbeza daripada mahkamah sesyen; (b) adasama ada kedua-dua tuntutan tersebut adalah berdasarkan kepada kausa tindakan yang berbeza; (c) sama ada pihak dalam kedua-dua tuntutan adalah berbeza; dan (d) sama ada tuntutan itu membawa kepada pengkayaan tidak adil.

Diputuskan, membenarkan rayuan plaintif; mengetepikan keputusan mahkamah sesyen; dan mengembalikan tuntutan plaintif di mahkamah sesyen:

(1) Dari penyataan tuntutan kes ini, tuntutan plaintif di mahkamah sesyen adalah untuk ganti rugi untuk konspirasi dan kecuaian, kedua-duanya adalah kausa tindakan dalam tort yang mana Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk memberikan ganti rugi kepada plaintif untuk tuntutan tersebut. Dalam membenarkan pembatalan tersebut, mahkamah sesyen gagal untuk menghargai bahawa plaintif tidak menuntut ganti rugi kerana pemecatan salah dalam penyataan tuntutannya. Plaintif tidak memohon remedi undang-undang umum untuk pemecatan salahnya di mahkamah sesyen di mana tuntutannya adalah untuk ganti rugi untuk konspirasi dan kecuaian yang menjadi kausa tindakan dalam tort. Oleh itu, tuntutan plaintif di mahkamah sesyen berbeza daripada kes Mahkamah Perusahaan (lihat perenggan 19–21).

(2) Kausa tindakan plaintif di Mahkamah Perusahaan adalah untuk pemecatan salah dan tidak adil. Isu-isu yang terlibat adalah sama ada pemberhentian yang dikatakan adalah wajar dan sama ada penamatan kerja plaintif adalah dengan atau tanpa sebab yang adil. Kausa tindakan plaintif di mahkamah sesyen adalah konspirasi dan kecuaian tort.

Elemen-elemen yang perlu dibuktikan dan isu-isu yang terlibat adalah sama sekali berbeza daripada kes Mahkamah Perusahaan. Tiada kependuaan prosiding hanya dengan alasan kedua-dua guaman berkongsi fakta asas yang sama. Kausa tindakan adalah berbeza dalam sifat dan remedi yang dipohon adalah berbeza (lihat perenggan 22–23 & 26).

(3) Adalah undang-undang lapuk bahawa apabila salah telah dilakukan oleh beberapa pihak sama ada secara bersama atau bersama dan berasingan kepada pihak lain, pihak tersebut berhak memfailkan tuntutan terhadap semua atau salah satu atau lebih dari pihak yang salah. Oleh kerana defendan ketiga hingga ketujuh tidak dapat bergabung sebagai pihak di Mahkamah Perusahaan, ia adalah wajar bahawa tindakan berasingan dibawa terhadap mereka di mahkamah sivil (lihat perenggan 30).

(4) Isu ganti rugi berulang tidak timbul kerana ganti rugi yang akan diberikan dalam guaman ini timbul daripada kausa tindakan yang berbeza dalam prosiding Mahkamah Perusahaan. Walau apa pun, adalah undang-undang lapuk bahawa plaintif mesti membuktikan ganti ruginya. Sekiranya terdapat ganti rugi berulang seperti yang dikatakan, mahkamah dalam menilai ganti rugi sentiasa mengambil kira award yang diberikan dalam kes lain dan membuat potongan atau pelarasan yang perlu untuk mengelakkan tuntutan berganda. Di Mahkamah Perusahaan, sehingga rayuan ini dihujahkan, plaintif tidak memfailkan penyata kes. Oleh itu, tiada asas undang-undang atau fakta bagi defendan untuk menegaskan bahawa terdapat kependuaan prosiding oleh itu dakwaan demikian adalah andaian semata-mata (lihat perenggan 34–36).]

Notes

For a case on appeal against order allowing striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 9278.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 5 MLJ 773; [2008] 6 CLJ 473, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] 2 AMR 1969, SC (refd)

Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman; Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors [1987] 2 MLJ 633; [1987] CLJ Rep 472 (refd)

Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors [2013] 10 MLJ 1; [2013] 5 CLJ 488, HC (refd)

Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors [2011] 5 MLJ 521; [2011] 5 CLJ 481, FC (refd)

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304, FC (refd)

Edward Goh Geok Seng v Dunstan Dumpangol & Ors [1989] 2 MLJ 119, HC (refd)
Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238, FC (refd)
HT Maltec Consultants v Malaysian Resources Corporation Berhad & Ors [2015] 5 AMR 607, HC (refd)
KMS Builders Sdn Bhd v Hazama Corporation [2002] 8 CLJ 553, HC (refd)
Kempas Edible Oil Sdn Bhd v Prabdhial Singh Dardara Singh [2015] 7 CLJ 203, CA (refd)
Koperasi Pos Nasional v Hafsah bte Mohd Tahir [2002] 6 MLJ 691; [2003] 8 CLJ 209, HC (refd)
Maybank Investment Bank Berhad v Hamzah Mahmood & Anor [2011] 1 LNS 643, HC (refd)
Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (refd)
Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor [1967] 1 MLJ 87 (refd)
Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu [2010] 5 MLJ 295; [2010] 6 CLJ 1, CA (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558; [1999] 2 CLJ 886, HC (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 2 AMR 301; [2010] 3 CLJ 507, FC (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996]1 MLJ 661; [1996] 1 AMR 300, CA (refd)
Yeoh Eng Kong v Choo Kok Yeow & Anor [2016] MLJU 1722; [2016] 3 CLJ 794, CA (refd)

Legislation referred to

Federal Constitution art 5(1)
Industrial Relations Act 1967 s 20
Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(d)

YC Wong (YC Wong & Co) for the plaintiff.
Sebastian Tay Hanxin (Lee Hishamuddin Allen & Gledhill) for the defendants.

Azmi Abdullah JC:

INTRODUCTION

[1] The parties herein will be referred to according to the titles designated to them in the sessions court. This is the plaintiff's appeal against the sessions court's decision dated 13 February 2018 allowing the defendants' application to strike out the plaintiff's statement of claim essentially on the argument of

duplicity of action by plaintiff as notwithstanding his action against the first and second defendants' in the Industrial Court under s 20 of the Industrial Relations Act 1967, the plaintiff has also instituted the action before the sessions court against the same two defendants together with five other defendants.

[2] This court in hearing the appeal, after perusing the written submissions of both parties and further oral clarifications being made, decides on 15 August 2018 to allow the appeal and sets aside the decision of the learned sessions court judge.

[3] Dissatisfied with the decision made, the defendants' have filed an appeal to the Court of Appeal hence the writing of the grounds for the decision derived at by this court.

BACKGROUND FACTS

[4] The defendants' application has been made under O 18 r 19(1)(b) and/or (1)(d) of the Rules of Court 2012. Their sole ground of application is duplicity of proceedings. Their averment is that the plaintiff's claim overlaps with his claim in the Industrial Court against the first and second defendants. In their application, they are not challenging the truth of any of the averments made in the statement of claim.

[5] Hence, all the averments in the plaintiff's statement of claim made be presumed to be true as derived from *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87.

[6] The plaintiff's pleaded case are as follows:

(a) the plaintiff was under the employment of the second defendant, and in substance, the first defendant which owns 100% of the second defendant. The first and second defendants operated as one unit. Arising from the plaintiff's excellent performance, he was appointed as the acting head of procurement in August 2016 and subsequently promoted as the head of procurement on or about 1 November 2016;

(b) the third to seventh defendants were at all material times employees of the first and second defendants, each heading separate departments;

(c) the third to seventh defendants unlawfully conspired with each other and/or other persons whose identities are uncertain to the plaintiff ('the other conspirators') as well as the second defendant's then CEO Naresh Alagan to oust the plaintiff from his position as the acting head and

thereafter as the head of procurement and/or damage or destroy the plaintiff's employment with the predominant purpose of injuring the plaintiff;

(d) pursuant thereto, the said defendants and/or the other conspirators wilfully and wrongfully did, inter alia, the acts set out in para 16 of the statement of claim. They conspired together to create a scheme to oust the plaintiff by way of a sham restructuring and retrenchment in order to pave the way for the third defendant to take the plaintiff's position under the guise of a new departmental head;

(e) the first and second defendants were involved in the conspiracy directly and/or vicariously. They also breached their duties to the plaintiff in allowing or participating in or instructing the act or acts specified in para 16 of the statement of claim;

(f) on 2 December 2016, the plaintiff was forced to leave his job place immediately in an utmost stressful and embarrassing atmosphere, watched by his team members and other staff of the second defendants. His dignity and reputation were destroyed. He lost his employment and livelihood at the age of 43. He suffered damage to his economic expectations, loss of reputation, stress, anxiety and inconvenience, as well as injury to his feeling;

(g) the plaintiff lodged a complaint with the Industrial Relations Department for wrongful and/or unfair dismissal pursuant to s 20 of the Industrial Relations Act 1967 on 20 December 2016. The defendants retaliated maliciously, and by their wrongful acts as set out in para 23 of the statement of claim, they destroyed the plaintiff's opportunity to obtain another permanent job with Dell Computers;

(h) the plaintiff filed the suit in the sessions court in August 2017, claiming damages for conspiracy, including exemplary damages and aggravated damages against all the defendants jointly and severally. He also claims damages against the first and second defendants for negligence;

(i) the plaintiff's complaint to the Industrial Relations Department has been referred by the Minister to the Industrial Court under Case No 18/4–1316 of 2017 sometime in August 2017. All the defendants' are averring in this application to strike out is that there is a duplicity of proceedings because the plaintiff's claims herein and in the Industrial Court are of the same nature; and

(j) upon reading the submissions of both parties, on 13 February 2018, the sessions court allowed the defendants' application to strike out the plaintiff's statement of claim hence this appeal.

GUIDING PRINCIPLES

[7] Order 18 r 19(1) of the Rules of Court 2012 lays down as follows:

> The Court may at any state of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
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> (a) ...
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> (b) it is scandalous, frivolous or vexatious;
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> (c) ...; or
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[8] The authority of the court to dismiss an action summarily is a drastic one. The court will only strike out a claim in plain and obvious cases and where the claim is obviously unsustainable on the face of it. So long as the pleadings disclose some cause of action or raise some questions fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out. This is clealy enunciated in the often quoted precedent of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7.

[9] The test of 'obviously unsustainable' in *Bandar Builder* was elaborated by the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1 as follows:

> [58] The 'obviously unsustainable' test as adopted in *Bandar Builder*, would ensure fair trial and access to the court to litigants. The respondents (the plaintiffs) should be given their day in court to prove their case. The court should not strike out an action purely or for the simple reason that it is 'unsustainable'. *The degree of 'unsustainability' must be higher, ie, it must be 'Obviously unsustainable' before the action can be struck out summarily.* The court should not pull its shutter down.

[10] The Federal Court held in the case of *Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors* [2011] 5 MLJ 521; [2011] 5 CLJ 481 that when there is any doubt whether that discretion to strike out should be exercised, such application should be dismissed.

[11] In *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773; [2008] 6 CLJ 473, the Court of Appeal held:

> ... It is trite law that it is only in conspicuously unsustainable cases that a pleading

A generally and a claim specifically would be struck out under any limb of O 18 r 19(1) and such power would only be exercised by the court sparingly ...

[12] In *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; [1999] 2 CLJ 886, the High Court held:

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... A case should only be stuck out if it is obviously unsustainable. The operative word is not 'unsustainable' but 'obviously'. Which denotes that on the face of it the claim is evidently unsustainable in law.

C Upon the available affidavit evidence, the plaintiff's action could not be said to be obviously unsustainable. There were issues, both of fact and law, that had to be tried.

[13] In *HT Maltec Consultants v Malaysian Resources Corporation Berhad & Ors* [2015] 5 AMR 607, these principles were enumerated in adopting the stance of the superior courts pertaining to such an application:

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(a) a pleading can only be struck out in a plain and obvious case namely where that pleading is obviously unsustainable — the Supreme Court's judgment in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at p 43; [1993] 2 AMR 1969 at p 1975;

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(b) the mere fact that a pleaded case is weak and not likely to succeed, is not a ground to strike out that pleading — *Bandar Builder Sdn Bhd* at p 44 (MLJ); p 1976 (AMR);

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(c) the court will assume that the contents of the pleading in question are true — the Court of Appeal's decision in *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996]1 MLJ 661 at p 679; [1996] 1 AMR 300 at p 323; and

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(d) every Malaysian citizen has a constitutional right of access to justice under art 5(1) of our Federal Constitution — the Federal Court's judgment in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 at p 339–341; [2010] 2 AMR 301 at p 313; [2010] 3 CLJ 507 at pp 514–515. Unless a suit is obviously unsustainable, I will be reluctant to deprive a Malaysian citizen of his or her fundamental right of access to justice.

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ISSUES RAISED

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[14] The plaintiff argues that the plaintiff's claim is not obviously unsustainable with the defendants' allegation of duplicity of proceedings being misconceived. This court shall examine these issues in deciding:

(a) the Industrial Court's jurisdiction and function are separate and distinct from the sessions court. The remedy and relief which the Industrial Court may award in the plaintiff's claim therein are different from what the sessions court may award;

(b) the two claims are based on different causes of action;

(c) the parties in the two claims are not the same; and

(d) whether the claim leads to unjust enrichment.

Jurisdiction of the Industrial Court

[15] The Industrial Court is a creature of the Industrial Relations Act 1967 ('the IRA'). Hence, its powers must be discovered only from the four corners of the IRA. Its jurisdiction is limited to the terms and subject matter of the reference by the Minister. This is because the threshold jurisdiction of the Industrial Court is conferred by the Minister's reference and the court has no jurisdiction to change the scope of the reference.

[16] In *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449, the Federal Court held that the function of the Industrial Court on dismissal cases was two-fold, namely to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal.

[17] The function of the Industrial Court was also explained at length by the Court of Appeal in *Kempas Edible Oil Sdn Bhd v Prabdhial Singh Dardara Singh* [2015] 7 CLJ 203.

[18] The plaintiff's claim in the Industrial Court is for reinstatement and back wages which are under the sole jurisdiction of the Industrial Court as decided in *Koperasi Pos Nasional v Hafsah bte Mohd Tahir* [2002] 6 MLJ 691; [2003] 8 CLJ 209. It is only when reinstatement is not possible under the circumstances that the Industrial Court will grant compensation in lieu of reinstatement. The sessions court has no jurisdiction to entertain a claim for reinstatement as held in *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu* [2010] 5 MLJ 295; [2010] 6 CLJ 1 (CA).

[19] From the statement of claim of the case, the plaintiff's claim in the sessions court is for damages for conspiracy and negligence, both of which are causes of action in tort which the Industrial Court has no jurisdiction to grant damages to the plaintiff for such claim.

[20] In allowing the striking out, the sessions court has failed to appreciate that the plaintiff does not claim damages for wrongful dismissal in his statement of claim (see para 25 of the statement of claim) (record of appeal at pp 49–50). The plaintiff herein is not seeking for common law remedy for his wrongful dismissal in the sessions court whereby his claim is for damages for conspiracy and negligence which are causes of actions in tort.

[21] Hence the plaintiff's claim in the sessions court is distinct from the Industrial Court case.

Different causes of action

[22] The plaintiff's cause of action in the Industrial Court is for wrongful and/or unfair dismissal. The issues involved are whether the purported retrenchment was genuine, and whether the termination of his employment was with or without just cause.

[23] His causes of action in the sessions court are the tort of conspiracy and negligence. The elements needed to be established and the issues involved are completely different from that of the Industrial Court case.

[24] In *KMS Builders Sdn Bhd v Hazama Corporation* [2002] 8 CLJ 553 at p 571 para d to p 572 para e, the court dismissed the defendant's application for striking out and stated, inter alia, as follows:

> *It is obvious that the argument raised by the defendant of duplicity of proceedings is devoid of merit, because the cause of action by the defendant against the plaintiff in the writ action is markedly different from the orders prayed for by the plaintiff against the defendant herein.* Although in the writ action, the plaintiff would be required to stay the proceedings therein there is an overlap of issues to be decided, the plaintiff in the writ action is merely thwarting further proceedings against a claim for monies by the defendant whereas in the OS, the plaintiff is seeking declarations on the effect of the Arbitration Clause and appointment of arbitrator pursuant to s 12 of the Arbitration Act 1952. It is clear as night and day that the OS and writ action are totally different in nature and there is no duplicity of proceedings. In the case of *The Lyn Country Sdn Bhd v EIC Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828 the court held:
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> > (5) The basis of multiplicity of actions for the motion is devoid of merit since the issues were all different and they were between either of the respondents in the hearing of the petition (see p 219C).
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> > ...
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> > ... although there are some ancillary issues which overlap (ie, the issue on the arbitration clause), this alone will not entitle the defendant to succeed in striking out. The OS and writ action are all pending in the High Court though due to administrative arrangements they are to be heard before different judges. Secondly

the prayers and issues raised in the writ action has not been determined on its merits and the merits are to be resolved by arbitral proceedings. Henceforth it is not an abuse of process by filing the OS herein.

[25] In *Edward Goh Geok Seng v Dunstan Dumpangol & Ors* [1989] 2 MLJ 119, the High Court held that merely because same prayers have been asked for and substantially the same issues have been raised in both suits, this alone does not entitle the defendants to succeed to strike out the plaintiff's case, other factors have to be looked into as well. The court looked at several factors, inter alia, that none of the prayers and issues raised in the suits have been determined on merits.

[26] From the authorities it can be gathered that there was no duplicity of proceedings just by the reason of the two suits sharing the same underlying facts. The causes of action were different in nature and the remedies sought for were entirely different.

[27] In *Maybank Investment Bank Berhad v Hamzah Mahmood & Anor* [2011] 1 LNS 643, the defendant was allowed to claim damages for breach of contract in the civil court despite having a pending claim in the Industrial Court. The court also held that there was no duplicity as the defendant was claiming for different remedies under the two suits. It was held at para 3.8 as follows:

On Issue 1, the court is of the view that the addition of the first defendant's counterclaim for *damages for breach of contract should be allowed notwithstanding that the first defendant has a pending claim against the plaintiff in the Kuala Lumpur Industrial Court. The court holds this view as there does not appear to be any duplicity in the claims of the first defendant. In the Industrial Court the first defendant is claiming for statutory remedy of 'reinstatement to his former position in the company without loss of any benefits monetary or otherwise whatsoever under s 20 of the Industrial Relations Act 1967', whereas in his counterclaim the first defendant is claiming under common law for general damages arising from the breach of contract by the plaintiff.* A civil claim for damages for wrongfaaul dismissal has been recognised in the case of *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981]1 MLJ 238 where the Federal Court held that 'in the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law'. The decision in *Fung Keong* was followed in the case of *Shamsulbahri Shaffie v Titan Petchem (M) Sdn Bhd* [2010] 4 CLJ 242 where the court held that the plaintiff in a claim for a declaration that his purported dismissal by the defendant was wrongful was not in any way restricted to bring an action in a civil suit as opposed to by way of representations to the Industrial Court under s 20 of the Industrial Relations Act 1967. However, such a claim was restricted to damages as provided for under the common law.

[28] It is also discovered that where claims had been filed in the Industrial Court as well as the civil court, parties tended not to raise the objection of

duplicity. For example, in the case of *Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors* [2013] 10 MLJ 1; [2013] 5 CLJ 488, the plaintiff brought an action against the defendants for damages for, inter alia, slander and conspiracy to injure arising from her unlawful dismissal. She also sought relief in the Industrial Court for the claim for unlawful dismissal. The issue of duplicity of proceedings was not raised as they were based on different causes of action.

Different parties named

[29] There are seven defendants in this suit whist in the Industrial Court case, the sole respondent is the second defendant herein. The first defendant has been joined as a co-respondent in the Industrial Court case pursuant to a recent order for joinder dated 4 April 2018. The rest of the defendants cannot be added as respondents in the Industrial Court case as they are not the 'employer'.

[30] It is trite law that when a wrong has been done by several parties either jointly or jointly and severally to another party, that party is entitled to file a claim against all or any one or more of the wrong doers. Since the third to seventh defendants cannot be joined as parties in the Industrial Court, it is apt that a separate action be brought against them in a civil court.

No unjust enrichment

[31] In the defendants' affidavit in reply at pp 86–91 of the record of appeal, they contend that the plaintiff will be unjustly enriched if two proceedings are to run concurrently however it must be noted that the two proceedings are based on two different causes of actions against different defendants. Two separate and distinct rights of the plaintiff have been breached. Hence, there is no resultant overlapping of damages.

[32] In fact, since there are different causes of action, even after the plaintiff has obtained judgment or award in one case, he will still be entitled to proceed with his claim in the other case, because the cause of action in the latter case, being a different one, will not be merged in the judgment or award.

[33] In *Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman; Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors* [1987] 2 MLJ 633; [1987] CLJ Rep 472, the court stated as follows at p 642 (MLJ); p 484 para g to p 485 para d (CLJ Rep):

> With regard to prayer 2(b)(ii), Mr Ross-Munro raised a new ground, that is the doctrine of merger. In prayer 2(b)(ii) Lorrain asks the court to determine whether the plaintiffs can maintain the present action by reason of the matters set out in

paras 56, 58 and 59 of his statement of defence. Paragraph 58A(b) of Lorrain's statement of defence states that BMF had sued and obtained judgment in Hong Kong against one of the debtors, CNL in Suit 1983 No 15133 on 17 July 1984 for the recovery as a debt of the said US$38.5m and US$1.5m referred to in the statement of claim. In para. 59, Lorrain avers that the plaintiffs' causes of action in respect of the said US$38.5m and US$1.5m loans have merged in the Hong Kong judgment.

Mr Ross-Munro submitted that the plaintiffs cannot obtain judgment against CNL in Hong Kong and at the same time sue Lorrain for judgment on the said sum because those two rights are inconsistent. These inconsistent rights merged into the judgment.

The question is what is the position of the law relating to merger? When a judgment has been given in an action, the cause of action in respect of which it was given is merged in the judgment and its place is taken by the rights created by the judgment, so that a second action may not be brought on that cause of action. *There will be no merger unless the cause of action is the same in both actions. Halsbury's Laws of England* (4th Ed, Vol 26) p 274. In *Issacs & Sons v Salbstein & Anor* [1916] 2 KB 139, Pickford LJ said:

> If the liability is joint, there is only one cause of action, and that becomes merged with the judgment; *if the liability is several, there are two causes of action and there is no merger by reason of the judgment.*

In *Goldrei, Foucard & Son v Sinclair* [1918] 1 KB 180, the English Court of Appeal held that the plaintiffs were entitled to recover, as there were two causes of action, one against the company for rescission of the agreement and the repayment of the £105, in respect of which fraud was not a necessary element, and the other against both defendants to recover damages for fraud; and that *the judgment against the company and the claim for rescission was no bar to the claim against the first defendant for damages for fraud.*

In the instant case, the cause of action in the Hong Kong suit was breach of contract. The cause of action against Lorrain in C438 is breach of fiduciary duty. These are two different causes of action. Furthermore, the defendants are not the same in the two actions. In the Hong Kong suit the defendant was CNL. In C438 the defendants are Lorrain and three others. In the circumstances the doctrine of merger does not apply in the present case.

[34] The issue of overlapping damages will not arise as the damages to be awarded in this suit arises from a different cause of action in the Industrial Court proceedings as decided in the Court of Appeal case of *Yeoh Eng Kong v Choo Kok Yeow & Anor* [2016] MLJU 1722; [2016] 3 CLJ 794.

[35] In any event, it is trite law that the plaintiff must prove his damages. If there are overlapping damages as alleged, the court in assessing damages could always take into account the award granted in another case and make such necessary deduction/adjustment to avoid double recovery.

[36] Furthermore, as has been informed to this court, in the Industrial Court case, until this appeal is argued, the plaintiff/claimant has not filed a statement of case. There is therefore completely no legal or factual basis for the defendants to contend that there is a duplicity of proceedings thus such contention is purely conjecture.

THE DEFENDANTS' SUBMISSION

[37] The argument of the defendants that once an action is pursued in the Industrial Court it then prohibits the filing of a civil action is centred on two cases as found at pp 16–18 of the written submission dated 21 May 2018 with the first being *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238.

[38] However, this court opines that the precedent did not lay down such a position or principle of law. Based on the ratio of the precedent found at p 238, the precedent actually deliberates on the process of pursuing an Industrial Court action and the issue of the civil action not providing for the relief of reinstatement. The principle in *Fung Keong* is accurately discussed in the case of *Maybank Investment Bank Berhad* found in para 27 of this writing.

[39] As for the case of *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, again this court finds that it is not supportive of the defendants' argument as it deals with the power of the High Court in quashing the decision of the Industrial Court should there be an error in law or fact exercised by the Industrial Court.

[40] Hence, the defendants' argument has failed to be accurately substantiated.

CONCLUSION

[41] This court is satisfied that this claim is based on the cause of action of conspiracy allegedly committed by the seven named defendants' and thus the suit is definitely more broad based than the Industrial Court action complaint with different parties and being grounded upon different facets of the law. This court finds that the suit cannot be deemed to be obviously unsustainable without the deliberation of a full trial pertaining to the actions of the third to seventh defendants inter related to the conduct of the first and second defendants being examined and evidence presented.

[42] It would be unjustifiable to decide on the issues raised and to curtail the plaintiff's action based merely on the affidavit evidence without a recourse to viva voce evidence.

[43] This court allows the plaintiff's appeal thus setting aside the sessions court's order dated 13 February 2018 with the effect of reinstating the plaintiff's claim in the sessions court with costs.

Plaintiff's appeal allowed; decision of sessions court set aside; plaintiff's claim in sessions court reinstated.

Reported by Mohd Kamarul Anwar